question of law of public interest but must also be one which would affect or has affected the course of the trial. It entails, in our view, some element of finality in the order such that it would affect or has affected the course of the trial meaning the passage or progress of the proceedings.

The position under section 66 of the Act is that it requires the question of law determined by the High Court and sought to be referred to the Federal Court for its determination to be one which has affected the event of the appeal, and has influenced the result of the appeal and in the sense that there is a finality in the decision. Section 50(3A)(i), on the other hand, although it does not contain similar words such as "has affected the event of the appeal", but contains the words "would or has affected the course of the trial", we are nonetheless of the view that they do produce a substantially similar effect. Assuming for a moment that this is not what is intended by the legislature we can only foresee an intolerable position emerging and the trial Court shall have to accede to numerous requests for postponements to enable each party to appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated.

The next question therefore is under what circumstances does an order involving a question of law affect or be said to have affected the course of the trial? The answer to that would depend much upon the nature of the order, the stage of the trial at which it is made, and whether having regard to the circumstances of that case it would have the effect of bringing to a halt or suspending the progress of the proceedings.

It is pertinent to note that the opening words of sub-section (3A)(i) of section 50 of the Act indicate that this sub-section is in effect an exception to sub-section (1) of the Act which confers jurisdiction upon the Federal Court to hear and determine an appeal against a decision made by the High Court in the exercise of its original criminal jurisdiction which appeal, *inter alia*, relates to an appeal by a person convicted or otherwise found guilty against either a conviction or finding of guilt or against sentence or against both. Our view therefore is leave should only be given in exceptional cases. This Court should be very slow to exercise its discretion to grant leave to a party to appeal against an order made by the High Court in the exercise of its original criminal jurisdiction. We would emphasise that while an application under section 66 of the Act is for leave for the determination by the Federal Court of a question of law of public interest, an application under section 50(3A)(i) is strictly for leave to appeal against any order made by the High Court. In considering therefore whether this Court should exercise its discretion, it must primarily be satisfied that it is not only an exceptional case but it is a fit and proper case for leave to be granted to appeal against the order.

We now turn to the application before us. Both orders which the applicants are seeking leave to appeal were orders concerning the admissibility of certain documents. The question of admissibility of documents *per se* is a question of law and we do not think there is any doubt about that. But the question is whether it is a question of law of public interest? It is for the applicants to satisfy us that it is. The onus therefore is upon the applicants to show that the general principles governing the admissibility of documents are not firmly established or far from finally settled that it is in the public interest the law is reviewed or alternative views be found. We hardly think so. Fundamentally the general principles governing admissibility of documents are already firmly established and well settled and what remains to be done shall be to apply these settled principles to the facts of the case. That being the case, we are unable to say that the orders involved a question of law of public interest. For these reasons, we declined leave and dismissed the application.

Applications dismissed.

Solicitors: *Karpal Singh & Co.; Kumar & Co.; R. Rajasingam & Co.*

PUBLIC PROSECUTOR v. MOHAMED TARMIZI

[F.C. (Seah, Mohamed Azmi & Syed Agil Barakbah F. JJ.) September 17 & November 24, 1984]
[Kuala Lumpur – Federal Court Criminal Reference No. 2 of 1981]

Criminal Law and Procedure – Plea of guilty – Order to execute a bond for good behaviour – Revision – Order of Magistrate set aside and accused acquitted – No power to acquit without giving prosecution an opportunity of being heard – Criminal Procedure Code, ss. 173A, 325 & 326 – Courts of Judicature Act, 1964, s. 36.

In this case the respondent had been charged with the offence that he did suffer the loss of a firearm of which

he was lawfully possessed. He pleaded guilty and the learned Magistrate accepted his plea but ordered him to be discharged conditionally by ordering him to execute a bond for good behaviour. The case was called for revision before Harun J. who set aside the order of the Magistrate and acquitted and discharged the respondent. The Public Prosecutor referred the following question to the Federal Court – "Whether on a revision it would be right in law for the learned judge to acquit and discharge the accused who had pleaded guilty to an offence under section 35 of the Arms Act 1960 without giving the prosecution an opportunity of being heard."

Held: the order made by a judge on revision must be deemed to be a final order, as it cannot be the subject of an appeal, and therefore no final order discharging and acquitting an accused person should be made by the judge in exercising his revisionary power until all the evidence in possession of the prosecution has been produced in a trial and the trial court has pronounced a judgment upon the merits. The learned judge in this case was therefore wrong in law to have made an order discharging and acquitting the accused. The proper order should have been to set aside the plea of guilty and substitute it with a plea of not guilty and to send the case back to the Magistrate's Court.

Cases referred to:

(1) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.
(2) *Public Prosecutor* v. *Goh Kee Chuan* [1967] 1 M.L.J. 174.

FEDERAL COURT.

Miss Tee Hong Geok (Deputy Public Prosecutor) for the Public Prosecutor.

Respondent absent.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): This is a reference by the Public Prosecutor under section 66 of the Courts of Judicature Act 1964 (as amended) and the question of law of public interest which we have been asked to determine reads as follows:

"Whether on a revision, it would be right in law for the learned judge to acquit and discharge the accused who had pleaded guilty to an offence under section 35 of the Arms Act 1960 without giving the prosecution an opportunity of being heard."

The brief facts are that the accused pleaded guilty to the following charge:

That you, on 4.6.79 between 2.00 p.m. and 7.00 p.m. at No. 17/14, 7th Floor, Selangor Mansion, Jalan Masjid India, Kuala Lumpur, in the Federal Territory, being a person lawfully authorised to be in possession of a firearm, to wit a .38 Smith & Wesson revolver No. 119 J 44 and 7 rounds of .38 special ammunitions, did suffer the loss of the said firearm and ammunitions and that you have thereby committed an offence punishable under section 35 of the Arms Act 1960 (Act 206).

After the accused had admitted the facts outlined by the prosecution, the learned Magistrate accepted his plea of guilty and without proceeding to record a conviction discharged him conditionally by ordering him to execute a bond to be of good behaviour for a period of one year in the sum of $500.00 with one surety under section 173(A) of the Criminal Procedure Code (F.M.S. Cap. 6). When the case came up for revision before Harun J. the record of proceedings reads:

"DPP Mah Weng Kwai for Public Prosecutor.
Respondent – present in person.
Court:

Order of Magistrate set aside.
Respondent is acquitted and discharged.

Sgd. Harun."

In his grounds of decision the learned judge stated that since all the evidence that could be produced in support of the charge was before him and after examining it, he was of the opinion that the evidence was insufficient to support a conviction under section 35 of the Arms Act 1960. In our judgment, the course taken by the learned judge on revision of this case was not warranted by law nor can any authority be found to support it. It amounts to saying that the learned judge has satisfied himself, not on the evidence given at the trial but on evidence in the possession of the prosecution, that the evidence will not support the charge. With respect to the learned judge, it was not his function, when exercising his power of revision, to assess the strength or weakness of the prosecution case. This function is statutorily delegated to the Attorney-General under section 376(i) of the Criminal Procedure Code (F.M.S. Cap. 6).

It seems clear from the provision of section 326 of the Criminal Procedure Code that no party has any right to be heard when a judge is exercising his revisionary power except by leave of the learned judge. And section 325(ii) provides that no order shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by an advocate, in his own defence. Sub-clause (iii) of section 325 enacts that "Nothing in this section shall be deemed to authorise a judge to convert a finding of acquittal into one of conviction". However, in our

opinion, chapter XXXI of the Criminal Procedure Code dealing with a "revision" should be read with section 36 of the Courts of Judicature Act 1964 which reads:

> 36. Subject to any written law for the time being in force no party shall have any right to be heard before the High Court when exercising its power of revision and supervision:
> Provided that no final order shall be made to the prejudice of any person unless the person has had an opportunity of being so heard.

Since any order made by a judge on revision cannot be the subject of an appeal, the order shall, in our opinion, be deemed to be a final order and is therefore subject to this proviso. *A fortiori,* no final order discharging and acquitting an accused person should in our opinion, be made by any judge exercising his revisionary power until all the evidence in possession of the prosecution has been produced in a trial and the trial court had pronounced a judgment upon the merits [*Kuppusamy* v. *Public Prosecutor*[1] and *Public Prosecutor* v. *Goh Kee Chuan*[2]]. As there was no trial in this case the learned judge should not have made the order purporting to discharge and acquit the accused.

With these observations, we come now to deal with the question of law referred to us. Having regard to what we have adumbrated, we would answer it in the negative. Even if an opportunity had been given to the Public Prosecutor, we are of the opinion that the learned judge was wrong in law to have made an order discharging and acquitting the accused. In our judgment, the proper order should have been to set aside the plea of guilty and substitute it with a plea of "not guilty", and to send the case back to the Magistrate's Court for trial.

Order accordingly.

SAW SWAN KEE v. SIM LIM FINANCE (M) BERHAD

[F.C. (Seah, Mohamed Azmi & Syed Agil Barakbah F.JJ.) September 20 & November 30, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No. 85 of 1984]

Practice and Procedure – Garnishment – Claim of set off – Whether there was existing debt that could be set off – R.H.C. 1980, O.49, r.1.

In this case a housing developer, Syarikat Seri Belian Sdn Bhd, were the developers of a housing estate. The respondent had given them bridging loans, for which the respondent kept a running account with the developers under various secured loans. The land was charged to the respondent. The appellant had given up her rights to complete the purchase of a shop house in the estate and the developers had agreed to refund to her the sum of $18,700/-. The shophouse was subsequently sold by the developers for $35,000/- to third parties who paid $10,000/- to the developers and raised the balance of $25,000/- by way of loan obtained from the respondent on the security of a charge of the property. The appellant obtained judgment for $18,700/- against the developers and sought to garnish this sum out of the sum of $25,000/- in the hands of the respondent. An order *nisi* was made but was discharged in the High Court. The appellants appealed.

Held, allowing the appeal: (1) the issue in this case was whether when the garnishment order *nisi* was made there existed a debt due to the respondent from the judgment debtor, the developers;

(2) the amount stated to be a debt due to the respondent was in reality a balance of a secured loan and was not an actionable debt existing at the time the garnishment order *nisi* was made, as the balance of loan stated to be due was only ascertained subsequent to the date of the order nisi;

(3) in the absence of an actionable debt the sum of $25,000/- cannot constitute a cross-debt due to the respondent from the judgment debtor at the relevant date of the decree *nisi.*

Cases referred to:

(1) *Tapp* v. *Jones* (1875) L.R. 10 Q.B. 591, 593.
(2) *Rawley* v. *Rawley* (1876) 1 Q.B.D. 460.
(3) *Pyne* v. *Kinna* 11 Ir. Rep. C.L. 40.

FEDERAL COURT.

V. Balendran for the appellant.
Andrew T.S. Goh for the respondent.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): This is an appeal against the decision of the High Court in refusing to allow a